A

COLLEEN JEE SIAW LING

v.

WALTON INTERNATIONAL PROPERTY GROUP (M) SDN BHD

B

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[CASE NO: JR-9-2010-III]
1 OCTOBER 2010

C

LABOUR LAW: *Industrial Court - Stay of proceedings - Stay pending outcome of civil suit for damages filed by employer against employee - Whether stay order prevented case to be disposed of expeditiously as required by Industrial Court Act 1967 - Whether Minister's statutory*
D *exercise of power under s. 20(3) of Act affected - Whether application to quash interim award for stay allowed*

LABOUR LAW: *Industrial Court - Powers - Order for stay - Whether Industrial Court had power to order for stay - Industrial Court Act 1967, ss. 20, 29*
E

CIVIL PROCEDURE: *Judicial review - Interim award - Interim award for stay of Industrial Court proceedings in Kuching pending outcome of related civil suit filed in Kuala Lumpur - Whether Industrial Court had power to order for stay - Whether application to quash interim*
F *award allowed - Industrial Court Act 1967, ss. 20, 29 - Rules of the High Court 1980, O. 53*

CIVIL PROCEDURE: *Judicial review - Application - Failure to state relief sought in statutory statement as required by O. 53 Rules of the*
G *High Court 1980 - Relevant party also not added to suit - Whether application proper in the circumstances*

The applicant, a Division Manager of the respondent company, was dismissed following a domestic inquiry on four charges. The
H applicant's dismissal was referred to the Industrial Court at Kuching ('IC') by the Minister under s. 20(3) of the Industrial Relations Act 1967 ('IRA'). The respondent, in the interim period, filed a civil suit in Kuala Lumpur ('civil suit') against the applicant and four other employees for breach of employment contract and
I also applied for stay of the IC proceedings pending the outcome of the civil suit. The IC made an interim award allowing the respondent's application for stay so as to avoid inconsistent finding of facts as the civil suit and the case before the IC contained

common issues of facts and witnesses, and as such, the IC, being an inferior court, should await the outcome of the High Court proceedings. The applicant now applied for judicial review to quash the interim award on the ground that the IC had no power to order for stay and that if it was found that the IC had such power, the decision to stay was based on wrong considerations.

At the outset of the hearing, the respondent raised two preliminary objections: firstly, that the relief sought which was an order to quash the interim award was not stated in the statutory statement as required by O. 53 Rules of the High Court 1980 ('RHC'), and secondly, that the Industrial Court in Kuching was not made a party to the suit.

Held (allowing the application with costs and dismissing the preliminary objections):

(1) Although the relief sought was not stated in the statutory statement, it was clearly stated in the applicant's application for leave. As leave was granted, it must be deemed that the error in not stating the relief sought in the statutory statement had been disregarded by the court that granted leave. Accordingly, the first preliminary objection should be dismissed. (para 6)

(2) In the event the substantive relief which was an order to quash the interim award was granted, an order to compel the IC to complete the hearing of the reference would not be necessary. That was because by operation of law, without the stay order granted by the interim award, the IC would be obliged to proceed with the hearing as envisaged by the IRA. Accordingly, the second preliminary objection should be dismissed. (para 7)

(3) Section 29 IRA which sets out the power of the Industrial Court, made no mention of the Industrial Court's power to order stay of proceedings. Further, sub-section (g) of s. 29 could not be construed as conferring the Industrial Court the power to stay its own proceedings as with its power to grant an adjournment. The said sub-section conferred the Industrial Court the power to give general directions for the expeditious disposal of matters. The stay of proceedings order in the interim award could not be a direction made for the expeditious determination of the Industrial Court proceedings.

In fact, the converse might be true as the Industrial Court would have to wait indefinitely until the civil suit was disposed of by the High Court. (paras 9 & 10)

(4) The scheme of the IRA did not confer the power to the IC to grant stay of proceedings. Once the Minister had referred a representation under s. 20(3) IRA, the IC was statutorily obliged to hear and determine the matter expeditiously. If the IC was prevented from hearing the reference merely because the employer had filed a civil suit for damages against the employee, the statutory exercise of the Minister's power under s. 20(3) would be effectively frustrated. Although the case before the IC would be reviewed every three months and the civil suit had passed the case management stage, the IC with the stay order, was not in a position to expeditiously complete the hearing of the reference as envisaged by the IRA. (para 11)

Case(s) referred to:

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Musa Keran v. Public Service Commission Malaysia [1995] 1 LNS 297 HC ***(dist)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(3), (4), 29(a), (b), (c), (d), (e), (f), (g), 30(3), (4), (5)

Rules of High Court 1980, O. 53 r. 3

For the applicant - Arthur Lee; M/s Arthur Lee, Lin & Co Advocates

For the respondent - Andy Tan (Lidwina Kiew & Wendy Loh with him); M/s David Allan, Sagah & Teng Advocates

Reported by Usha Thiagarajah

JUDGMENT

Ravinthran Paramaguru JC:

Preliminary

[1] This is an application by way of judicial review to quash the Interim Award No. 672 of 2010 made by the Industrial Court in Kuching on 17 May 2010 in case No. 8/4-536/09. The interim award was made pursuant to an application by the respondent.

The respondent applied to stay the Industrial Court proceedings in respect of the Ministerial reference under s. 20 of the Industrial Relations Act 1967. The application was opposed by the applicant.

Background Facts

[2] The applicant joined the respondent company in 2004 as an Executive Manager (Land Management). By 2007, she was promoted to the post of Division Manager (Land Management). However, following a domestic inquiry held on 8 July 2008, she was dismissed from her post. Four charges were preferred against her. She was accused of being disloyal to her employers by enticing four of her colleagues to join a rival company. She was also accused of interfering with the business of the company, conspiring with a colleague to injure the interest of the company and of being in breach of the common law duty of fidelity. After the failure of the reconciliation proceedings, the dispute was referred to the Industrial Court at Kuching by the Minister under s. 20(3). Meanwhile, the respondent filed a suit (S1-23-92-2008) in Kuala Lumpur against the applicant and four other employees for breach of the employment contract. The suit is related to the allegations disclosed in the four charges against the applicant. These allegations are also related to the defence of the respondent in the Industrial Court case. The Kuala Lumpur suit has passed the case management stage but has not reached the trial stage yet.

Application For Stay Before The Industrial Court

[3] The respondent applied for stay of the Industrial Court proceedings pending the outcome of Kuala Lumpur High Court civil suit. The grounds of application were that there were common issues and witnesses.

[4] The learned Chairman made an interim award allowing the stay of the Industrial Court proceedings pending the disposal of the civil suit which was filed by the respondent in the High Court. In summary, the grounds of the learned Chairman are as follows. The Civil Suit and the Industrial Court case contained common issues of facts and common witnesses to be called before both courts. Therefore in order to avoid inconsistent findings of facts, the Industrial Court being an inferior court should await the decision of the High Court on the common issues of facts.

[5] The instant judicial review application by the applicant is to quash the interim award on the ground that the Industrial Court had no power to stay the proceedings and that if it is found that the court has the power to order a stay, the decision to stay was based on wrong considerations.

Preliminary Objections

[6] At the outset of the hearing, counsel for respondent raised the point that the statutory statement under O. 53 of the Rules of High Court 1980 was defective. Order 53 r. 3 requires the statutory statement to set out the name and description of the applicant, the relief sought and the grounds on which it is sought. The relief sought, which is an order to quash the interim award, is not stated in the statement. The grounds of the application are fully stated in the statement. Despite the omission to state the relief sought in the statutory statement, it is clearly stated in the application for leave. The High Court granted leave after considering the prayer to quash the interim award in the application for leave and the statutory statement. In the premises, as leave was granted, it must be deemed that the error in not stating the relief sought in the statement had been disregarded by the court that granted leave. *Musa Keran v. Public Service Commission Malaysia* [1995] 1 LNS 297 cited by counsel for respondent can be distinguished because in that case the error of law relied upon by the applicant was not stated in the statutory statement. Furthermore, in that case, the statutory statement and affidavit in support were not enclosed in the judicial review application. I shall therefore dismiss this preliminary objection to the judicial review application.

[7] The second preliminary objection is that the Kuching Industrial Court was not made a party to the suit. Counsel for respondent cited the case of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123. This objection is related to the second part of the prayer sought in this judicial review application which is for an order to compel the Industrial Court to complete the hearing of the reference made by the Minister. I shall dismiss the objection for the reason that in the event that the substantive relief which is an order to quash the interim award is granted, an order to compel the Industrial Court to complete the hearing of the reference would not be necessary. This is because by operation of law, without the stay

order which was granted by the interim award, the Industrial Court would be obliged to proceed with the hearing as envisaged by the Industrial Relations Act, 1967.

Whether The Industrial Court Has Power To Order A Stay?

[8] This is the core issue in this application. Counsel for respondent has submitted that the Industrial Court can order a stay under s. 29 of the Industrial Relations Act, 1967 whereas counsel for applicant's view is that the said provision and scheme of the Act do not confer or envisage such a power. Section 29 reads as follows:

> 29. Power of the Court.
>
> The Court may, in any proceedings before it:
>
> (a) order that any party be joined, substituted or struck off;
>
> (b) summon before it the parties to any such proceedings and any other person who in its opinion is connected with the proceedings;
>
> (c) take evidence on oath or affirmation and compel the production before it of books, papers, documents and things;
>
> (d) hear and determine the matter before it notwithstanding the failure of any party to submit any written statement whether of case or reply to the Court within such time as may be prescribed by the President or in the absence of any party to the dispute who has been served with a notice or summons to appear;
>
> (e) conduct its proceedings or any part thereof in private;
>
> (f) after consultation with the Minister, call in the aid of one or more experts; and
>
> (fa) order a case to be struck off or reinstated; and
>
> (g) generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it.

[9] As can be seen above, s. 29 sets out the power of the Industrial Court. Section 29(a)-(g) makes no mention of the Industrial Court's power to order a stay of proceedings. However, counsel for respondent submitted that sub-s. (g) must be read as implying the existence of this power. She argued that the power

to stay proceedings is similar to the power to grant an adjournment. Since s. 29(g) gives the court the power to give general directions for the expeditious determination of cases before it, the power to stay proceedings is also conferred by the same provision. I am not persuaded by this argument for the following reasons. The Industrial Court is a creature of statute and therefore its powers are necessarily circumscribed by the relevant provisions in it. Section 29(g) confers the power to give general directions for the expeditious disposal of matters. Even if one assumes that the power to stay proceedings is encapsulated within the power to give general directions, the said power must be exercised for the purpose of "expeditious determination". The dictionary meaning of "expeditious" is as follows:

> Expeditiously - expeditious manner; speedily, with expedition.
>
> Expedition - The action of expediting, helping forward or accomplishing; speedy performance or prompt execution (of justice, a journey); prompt supply (of anything), dispatch.
>
> (From the Oxford English Dictionary Second Edition)

[10] This means that the Industrial Court is enjoined by law to complete its proceedings speedily or with a combination of speed and efficiency. The question that arises in respect of the argument of counsel for respondent is whether the stay of proceedings order that was granted in this case was for the purpose of a speedy and efficient determination of the dispute at hand. The stay in question, as argued by counsel for applicant, is to all intents and purposes, an indefinite stay although the learned Chairman directed that the case would be called up for review every three months. This is because, the stay of proceedings was granted pending the disposal of a civil suit in the High Court of Malaya. The determination of the Industrial Court proceedings is therefore contingent upon the outcome of another case in another jurisdiction. The Industrial Court, by making the stay order through the said interim award, had effectively given up control of the proceedings in question for the present time. Therefore, it is difficult to argue that the "stay of proceedings order" in the interim award was a "direction" made for the expeditious determination of the Industrial Court proceedings. In fact, the converse may be true as the Industrial Court has to wait indefinitely until the High Court disposes off the civil suit. It is therefore not analogous to an "adjournment" as submitted by counsel for respondent. In my opinion, it is for this reason that

sub-s. (g) cannot be read as conferring on the Industrial Court the power to stay its own proceedings pending the outcome of a civil suit in the High Court. In the premises, the reliance of counsel for respondent on s. 29(g) is misplaced.

[11] I shall now consider whether the scheme of the Industrial Relations Act, 1967 permits the granting of an indefinite stay of the proceedings as happened in this case. In my opinion, the scheme of the Industrial Relations Act, 1967 does not confer the power to the Industrial Court to grant such a stay. As stated earlier, the Industrial Court is a creature of statute which was set up under the Industrial Relations Act, 1967. Parties who complain of unfair dismissal or are otherwise embroiled in an industrial dispute are not at liberty to register their cases before this court as of right. Proceedings before the Industrial Court are by way of reference from the Minister. In respect of complaints of unfair dismissal, an employee must make representations to the Director General within 60 days. If there is no expeditious settlement of the representation, the Director General shall notify the Minister. In the exercise of his discretion, the Minister may refer the representations to the Industrial Court for an award (see s. 20(3)). The Industrial Court is required by s. 30(3) to make its award without delay. All this means that once the Minister had referred a representation under s. 20(3), the Industrial Court is statutorily obliged to hear and determine the matter expeditiously. If the argument that the Industrial Court is prevented from hearing the reference merely because the employer had filed a civil suit for damages against the employee is valid, it would mean the statutory exercise of the power of the Minister under s. 20(3) of the Industrial Court, 1967 would be effectively frustrated. I am mindful of the argument of the counsel for respondent that the case would be reviewed every three months and that the civil suit has passed the case management stage. However by granting a stay of proceedings pending the outcome of a another case in a civil court, the Industrial Court cannot be said to be in a position to expeditiously complete the hearing of the reference as envisaged by the Industrial Relations Act, 1967. In respect of the common questions of fact that may arise in the two proceedings, counsel for applicant submitted that any finding of fact in the civil suit will not bind the Industrial Court. His reasons are as follows. The Industrial Court is not part of the civil court hierarchy. This is the reason that decisions of the Industrial Court can only be

challenged by way of judicial review and not appeal. The approach of the civil court and the Industrial Court need not necessarily be the same. Under s. 30(5) of the Act, the Industrial Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. Furthermore the claim in the Industrial Court is for unfair dismissal. The relief sought is reinstatement and back wages. The relief sought in the civil suit is for damages for breach of employment contract. The applicant did not file a counter-claim as she is barred by s. 20(4) of the Act. However, in view of my finding that the Industrial Court has no power to grant an indefinite stay of proceedings as it did in this case, it is unnecessary for me to decide whether the learned Chairman had correctly exercised his discretion to grant a stay of proceedings. For all the above reasons, I shall order Interim Award No. 672 of 2010 made on 17 May 2010 by the Industrial Court in Case No. 8/4-536-09 be quashed. Costs to the applicant to be taxed unless otherwise agreed.